

DUI SEMINAR

December 14, 2015
APAAC Training Center
Phoenix, Arizona



DUI DRUG CASES

Presented By:

WILLIAM B. BURKE
Flagstaff City Prosecutor
Flagstaff City Prosecutor's Office

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Rd., Suite 202
Phoenix, Arizona 85015

DUI Drug Cases

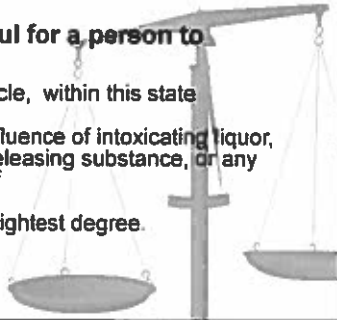
APAAC DUI Seminar
December 14, 2015



Impairment DUI Statute 28-1381(A)(1)

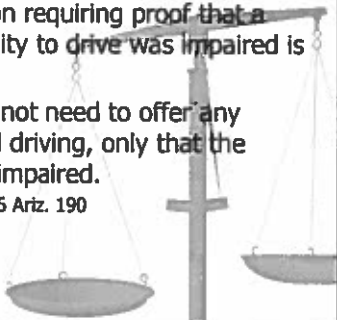
It is unlawful for a person to

- drive/APC, a vehicle, within this state
- while under the influence of intoxicating liquor, any drug, a vapor releasing substance, or any combination thereof
- if impaired to the slightest degree.



"Ability to Drive"

- A jury instruction requiring proof that a defendant's ability to drive was impaired is invalid.
- The State does not need to offer any evidence of bad driving, only that the defendant was impaired.
 - State v. Miller, 226 Ariz. 190



Per se DUI Drugs 28-1381(A)(3)

- Drive or be in actual physical control
- of a vehicle
- in this state
- while there is any drug defined in 13-3401 or its **metabolite** in the person's body.

Establish is in 13-3401

METABOLITE

State v. Harris (Shilgevorkyan, RPT)

- (A)(3) only applies to metabolites that are *capable of causing impairment*.
- Mere presence of inactive metabolites such as carboxy-THC does not violate 28-1381(A)(3)

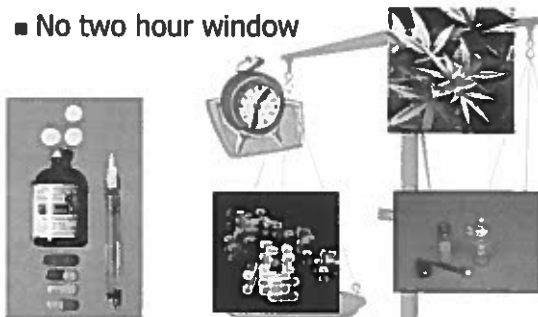
DUI Drugs 28-1381(A)(3)

- Impairment is NOT required!



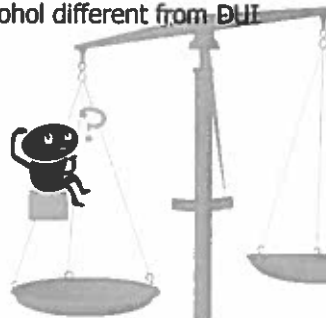
DUI Drugs 28-1381(A)(3)

- No two hour window



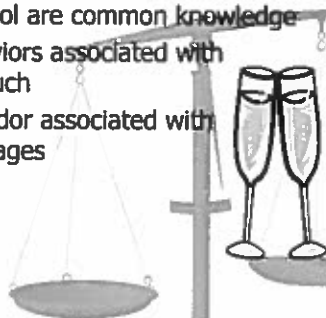
DUI Alcohol vs. Drugs

- Why is DUI Alcohol different from DUI Drugs?



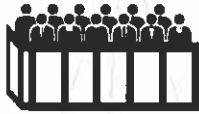
Impaired Driving: Alcohol

- Effects of alcohol are common knowledge
- Common behaviors associated with drinking too much
- Recognizable odor associated with alcoholic beverages



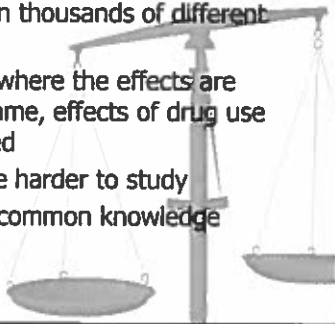
Alcohol is a Legal Drug

- Judges/Jurors have experience to draw on
- Alcohol effects have been studied, quantified



Impaired Driving: Drugs

- Thousands upon thousands of different drugs
- Unlike alcohol, where the effects are generally the same, effects of drug use are widely varied
- Illegal drugs are harder to study
- Effects are not common knowledge



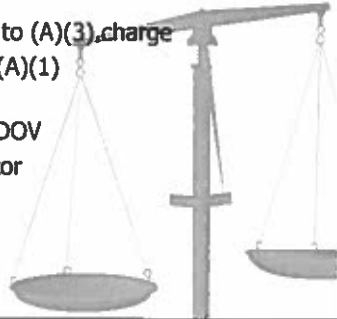
DUI Drug Cases are on the Rise

- Increase in both illegal and prescription drug cases
 - Better detection, police training
 - Newer and more potent drugs
 - People are aware of dangers and enforcement of alcohol DUI's



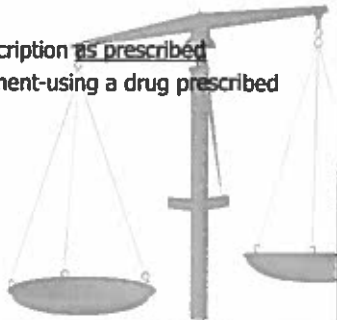
Prescription Drug Defense 28-1381(D)

- Potential defense to (A)(3) charge
- Not a defense to (A)(1)
 - ARS 28-1381(B)
- Must be valid on DOV
- Must be U.S. doctor



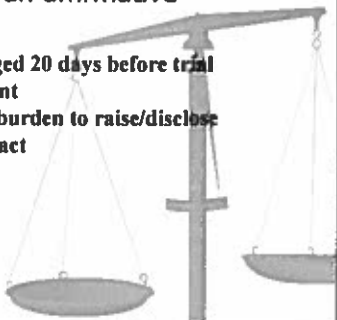
Prescriptions

- 28-1381(D)
 - Must take prescription as prescribed
 - Before amendment-using a drug prescribed by a doctor



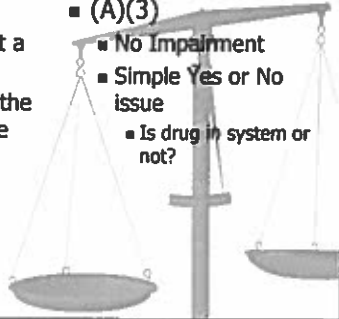
Prescriptions

- 28-1381(D) is an affirmative defense.
 - Must be alleged 20 days before trial
 - Not an element
 - Defendant's burden to raise/disclose
 - Question of fact



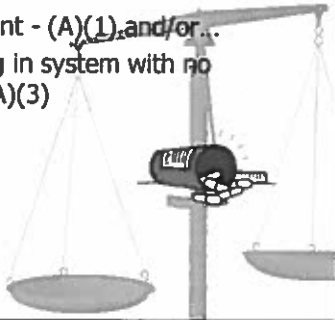
Make Differences of Charges Clear to Jury

- (A)(1)
 - Prescription not a defense
 - Impairment to the slightest degree
- (A)(3)
 - No Impairment
 - Simple Yes or No issue
 - Is drug in system or not?



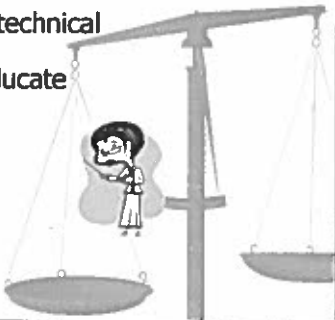
What Do We do With a DUI Drug Case?

- Prove impairment - (A)(1) and/or...
- Prove illicit drug in system with no prescription - (A)(3)



What Not to Do

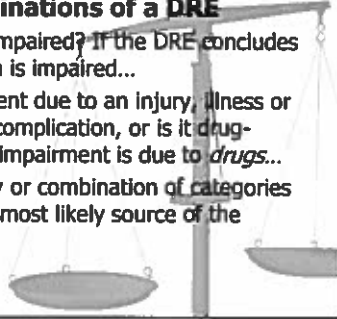
- Do not be too technical
- Don't rush - educate



DRE Exam

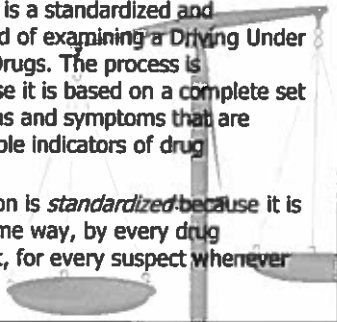
■ Three determinations of a DRE

- Is the person impaired? If the DRE concludes that the person is impaired...
- Is the impairment due to an injury, illness or other medical complication, or is it drug-related? If the impairment is due to *drugs*...
- Which category or combination of categories of drugs is the most likely source of the impairment?



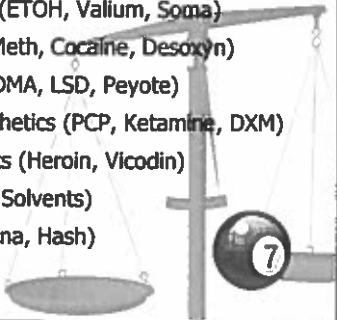
DRE Exam-Standardized and Systematic

- The DRE protocol is a standardized and systematic method of examining a Driving Under the Influence of Drugs. The process is *systematic* because it is based on a complete set of observable signs and symptoms that are known to be reliable indicators of drug impairment.
- The DRE evaluation is *standardized* because it is conducted the same way, by every drug recognition expert, for every suspect whenever possible.



Seven Drug Categories

- CNS Depressants (ETOH, Valium, Soma)
- CNS Stimulants (Meth, Cocaine, Desoxyn)
- Hallucinogens (MDMA, LSD, Peyote)
- Dissociative Anesthetics (PCP, Ketamine, DXM)
- Narcotic Analgesics (Heroin, Vicodin)
- Inhalants (Gases, Solvents)
- Cannabis (Marijuana, Hash)







DRE Protocol - Drug Recognition Evaluation									
Section	Item	Observations	Findings	Notes	Signature	Date	Time	Location	Officer
I. PRELIMINARY INFORMATION	1. Name of Subject								
	2. Date of Birth								
	3. Sex								
	4. Race								
	5. Height								
	6. Weight								
	7. Eye Color								
	8. Hair Color								
	9. Build								
	10. Other								
II. OBSERVATIONS	1. Appearance								
	2. Behavior								
	3. Speech								
	4. Motor Skills								
	5. Balance								
	6. Coordination								
	7. Alertness								
	8. Judgment								
	9. Memory								
	10. Other								
III. TESTS	1. Field Sobriety Tests								
	2. Horizontal Gaze Nystagmus (HGN)								
	3. Vertical Gaze Nystagmus (VGN)								
	4. Walk-and-Turn Test								
	5. One-Legged Stand Test								
	6. Romberg Test								
	7. Ruler Test								
	8. Coin Test								
	9. Other								
	10. Other								
IV. ANALYSIS	1. Blood Alcohol Content (BAC)								
	2. Urine Test								
	3. Hair Test								
	4. Saliva Test								
	5. Other								
	6. Other								
	7. Other								
	8. Other								
	9. Other								
	10. Other								
V. CONCLUSION	1. Summary of Findings								
	2. Officer's Opinion								
	3. Other								
	4. Other								
	5. Other								
	6. Other								
	7. Other								
	8. Other								
	9. Other								
	10. Other								

DRE Protocol

Principle works for all drug cases

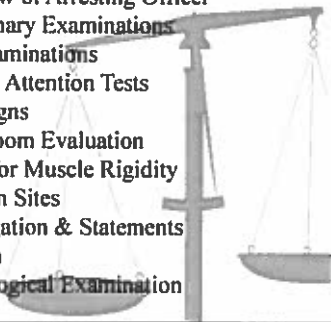
- 1) Making observations
- 2) Deducing impairment through the established principle that drugs cause identifiable and observable effects



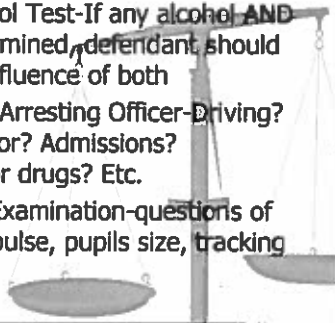
12 Step Evaluation

1. Breath Alcohol Test
2. Interview of Arresting Officer
3. Preliminary Examinations
4. Eye Examinations
5. Divided Attention Tests
6. Vital Signs
7. Dark Room Evaluation
8. Check for Muscle Rigidity
9. Injection Sites
10. Interrogation & Statements
11. Opinion
12. Toxicological Examination



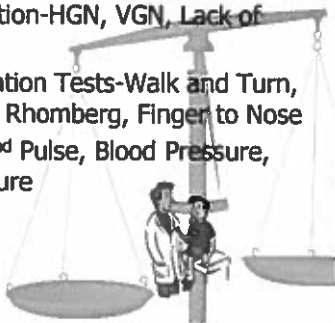
12 Step Evaluation cont.

- 1. Breath Alcohol Test-If any alcohol AND drugs are determined, defendant should be under the influence of both
- 2. Interview of Arresting Officer-Driving? Unusual behavior? Admissions? Paraphernalia or drugs? Etc.
- 3. Preliminary Examination-questions of defendant, 1st pulse, pupils size, tracking



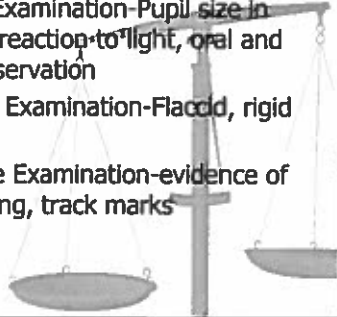
12 Step Evaluation cont.

- 4. Eye Examination-HGN, VGN, Lack of Convergence
- 5. Divided Attention Tests-Walk and Turn, One Leg Stand, Rhomberg, Finger to Nose
- 6. Vital Signs-2nd Pulse, Blood Pressure, Body Temperature



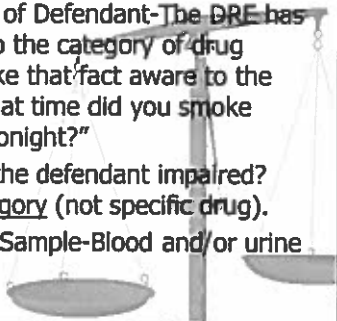
12 Step Evaluation Con't

- 7. Dark Room Examination-Pupil size in light and dark, reaction to light, oral and nasal cavity observation
- 8. Muscle Tone Examination-Flaccid, rigid or normal
- 9. Injection Site Examination-evidence of injection, scarring, track marks



12 Step Evaluation cont.

- 10. Statements of Defendant-The DRE has an opinion as to the category of drug taken, may make that fact aware to the defendant, "What time did you smoke your last joint tonight?"
- 11. Opinion-Is the defendant impaired? What drug category (not specific drug).
- 12. Toxicologic Sample-Blood and/or urine

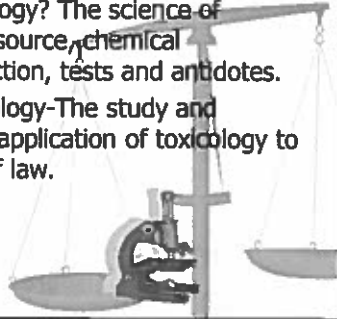


DRE Matrix

DRUG CATEGORY	CNS Depressants	CNS Stimulants	Hallucinogens	DAAs	Narcotic Analgesics	Inhalants	Cocaine
BUN	Present	None	None	Present	None	Present	None
AGN	Present	None	None	Present	None	Present	None
Track of Cocaine	Present	None	None	Present	None	Present	Present
Pupil Size	Normal	Dilated	Dilated	Normal	Constricted	Normal	Dilated
Reaction to Light	Slow	Slow	Normal	Normal	Little to None	Slow	Normal
Pulse	Down	Up	Up	Up	Down	Up	Up
Blood Pressure	Down	Up	Up	Up	Down	Up/Down	Up
Temperature	Normal	Up	Up	Up	Down	Up/Down/N	Normal

Toxicology

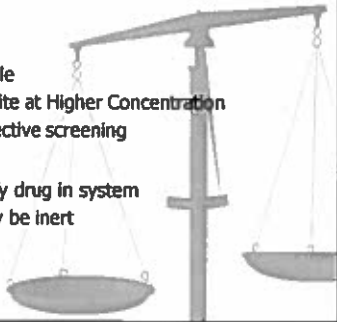
- What is Toxicology? The science of poisons—their source, chemical composition, action, tests and antidotes.
- Forensic Toxicology-The study and practice of the application of toxicology to the purposes of law.



Urine or Blood for Drug Test? (Or Both)

■ Urine

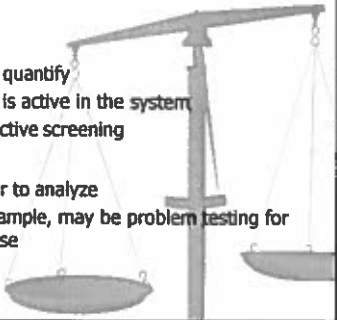
- The good:
 - Plenty of sample
 - Drugs/Metabolite at Higher Concentration
 - Easy, Cost-effective screening
- The Bad:
 - Cannot quantify drug in system
 - Metabolite may be inert



Urine or Blood for Drug Test?

■ Blood

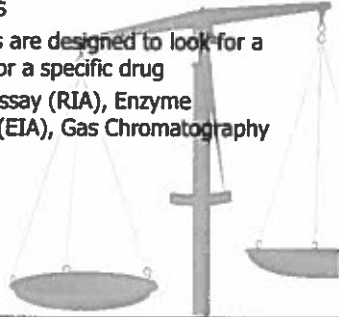
- The good:
 - May be able to quantify
 - Can tell if drug is active in the system
 - Easy, Cost-effective screening
- The Bad:
 - May take longer to analyze
 - Typically less sample, may be problem testing for multiple drug use



Analysis-Screening

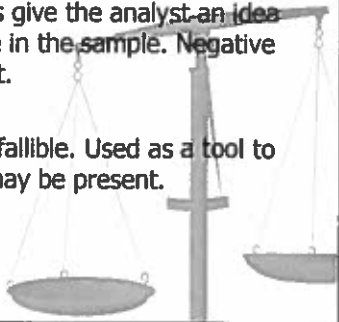
■ Screening Tests

- Screening tests are designed to look for a class of drugs or a specific drug
- Radioimmunoassay (RIA), Enzyme Immunoassay (EIA), Gas Chromatography (GC)



Screening, cont.

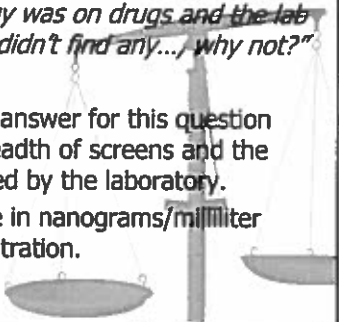
- Positive screens give the analyst an idea of what may be in the sample. Negative screen rules out.
- They are not infallible. Used as a tool to find out what may be present.



Cutoff Levels

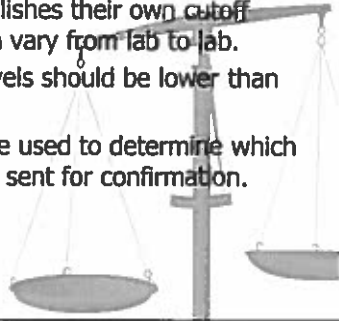
"I know this guy was on drugs and the lab didn't find any... why not?"

- The most likely answer for this question involves the breadth of screens and the cutoff levels used by the laboratory.
- Usually they are in nanograms/milliliter (ng/mL) concentration.



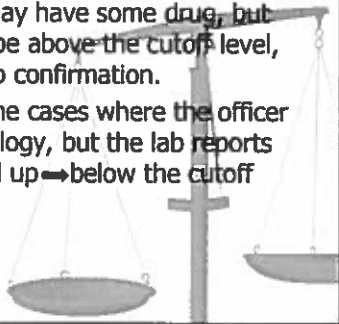
Cutoff Levels

- Every lab establishes their own cutoff levels, they can vary from lab to lab.
- Blood cutoff levels should be lower than urine.
- Cutoff levels are used to determine which samples will be sent for confirmation.



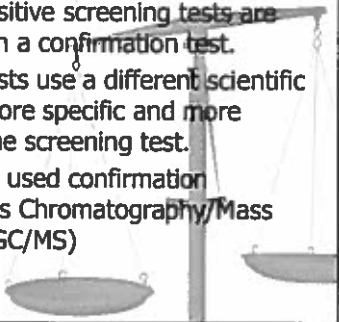
Cutoff Levels cont.

- Samples that may have some drug, but not enough to be above the cutoff level, will not move to confirmation.
- This is how some cases where the officer sees symptomology, but the lab reports "no drugs", end up below the cutoff level.



Confirmation Tests

- Presumptive positive screening tests are followed up with a confirmation test.
- Confirmation tests use a different scientific principle, are more specific and more sensitive than the screening test.
- Most commonly used confirmation procedure is Gas Chromatography/Mass Spectrometry (GC/MS)



Confirmation Tests, cont.

- The purpose of the confirmation test is to identify and possibly quantitate a drug.



Metabolism

- What is Metabolism? It is the biochemical transformation of a drug.
- Active and inactive metabolites
- Active metabolites show pharmacodynamic properties (diazepam → nordiazepam)
- Inactive metabolites do not have an effect on the body (THC → carboxy-THC)



Terms used in Toxicology

Psychoactive: adj. Affecting the mind or mental processes

Psychomotor: adj. Of or pertaining to muscular activity associated with mental processes

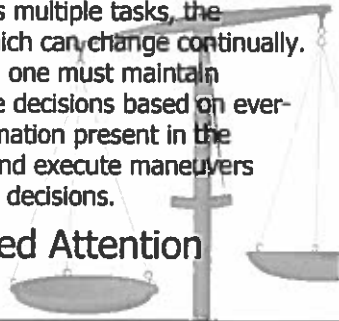
Either can be used to show impairment!



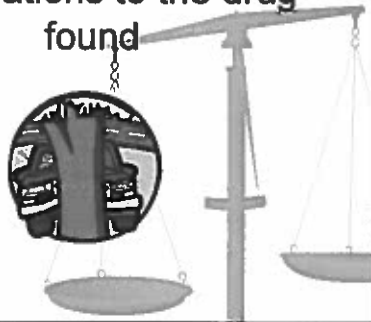
Operation of a Motor Vehicle

- Driving involves multiple tasks, the demands of which can change continually. To drive safely, one must maintain alertness, make decisions based on ever-changing information present in the environment, and execute maneuvers based on these decisions.

Divided Attention

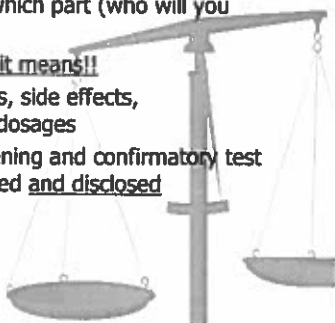


Try to correlate driving and observations to the drug found



Lab Report

- Who analyzed – which part (who will you call?)
- Understand what it means!!
 - PDR - warnings, side effects, recommended dosages
- Ensure both screening and confirmatory test has been completed and disclosed
- Chain of custody



Lab Report

What if the analyst is no longer available???

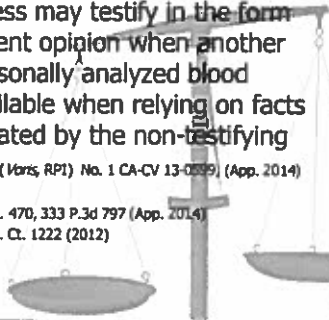
- Panic?
- No!



Tox Results without Toxicologist that tested

- An expert witness may testify in the form of an independent opinion when another expert who personally analyzed blood sample not available when relying on facts and data generated by the non-testifying expert. *State v. Karp* (Voris, RPI) No. 1 CA-CV 13-0099, (App. 2014)

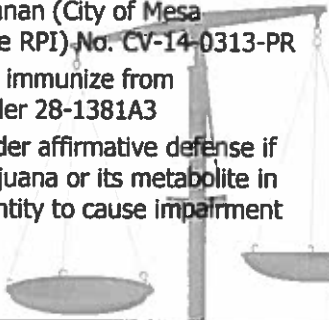
- *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014)
- *Williams v. Illinois*, 132 Sup. Ct. 1222 (2012)



Medical Marijuana - defense

Dobson v. McClennan (City of Mesa Prosecutor's Office RPI) No. CV-14-0313-PR

- AMMA does not immunize from prosecution under 28-1381A3
- Affords cardholder affirmative defense if they show marijuana or its metabolite in insufficient quantity to cause impairment



Lab Report

- Therapeutic doses
- Metabolites and impairment
- Contact the toxicologist BEFORE trial
- Do they need to check for additional drugs?

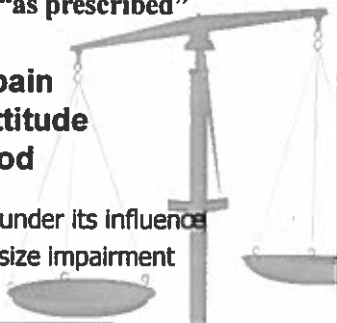


Why Take Prescriptions?

Even if “as prescribed”

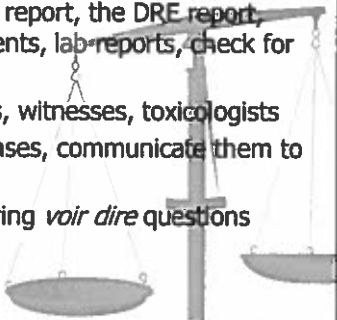
To alleviate pain
To change attitude
To effect mood

Person is under its influence
Emphasize Impairment



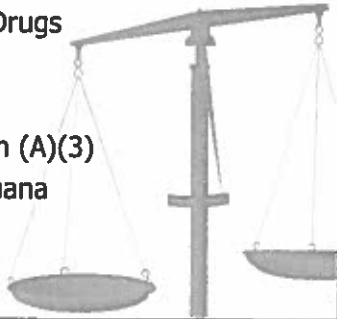
Getting Ready for Trial

- Read the police report, the DRE report, witness statements, lab reports, check for supplements
- Contact Officers, witnesses, toxicologists
- Anticipate defenses, communicate them to your witnesses
- Consider preparing *voir dire* questions



Consider *Voir Dire* Questions & Jury Instructions

- Prescription Drugs
- Illegal Drugs
- Metabolites
- Impairment on (A)(3)
- Medical Marijuana
- Spice (no tox)
- Others??



Prepare *Voir Dire* Questions for the Judge

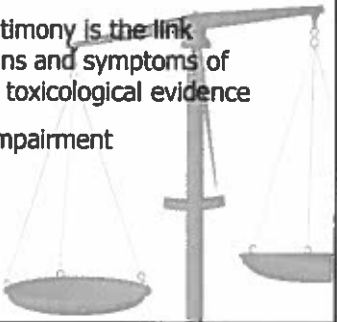
What if the Judge Denies Requested *Voir Dire*?

Ask for a mini opening



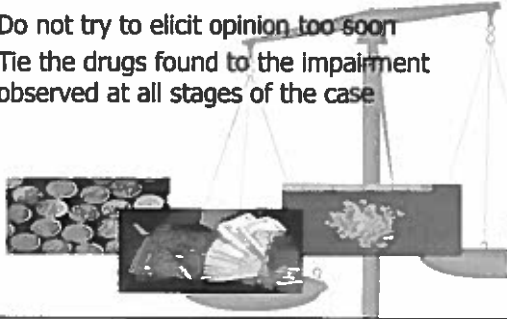
Direct Examination of officer

- The officer's testimony is the link between the signs and symptoms of impairment and toxicological evidence
- Officer proves impairment



Direct Examination of a DRE/Officer

- Do not try to elicit opinion too soon
- Tie the drugs found to the impairment observed at all stages of the case

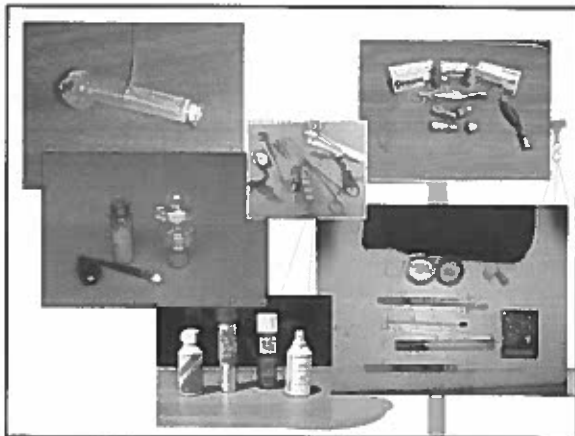


Make Use of Visual Aids

- Diagrams
- Charts
- Photos
- Videotapes
- Exhibits

People retain info they see better than if they just hear it

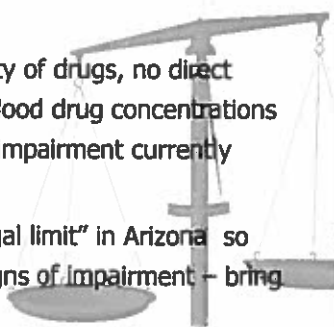






What Do The Numbers Mean?

- For vast majority of drugs, no direct correlation of blood drug concentrations with degree of impairment currently exists.
- There is no "legal limit" in Arizona so must look at signs of impairment – bring this out



Direct Examination of a Toxicologist

- Establish chain of custody
- Use expert to strengthen other parts of case (stop, roadside FSTs, etc.)
- Tie the drugs found to the impairment observed at all stages of the case
- Anticipate defenses/defense expert

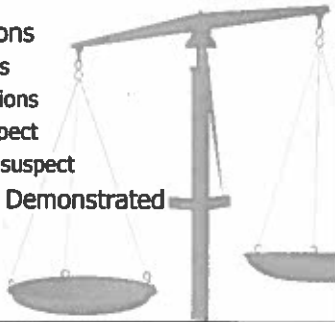


Tricky/Unusual Cases



Partial or Unusual Evaluations

- Partial Evaluations
 - Traffic collisions
 - Physical limitations
 - Combative suspect
 - Uncooperative suspect
- No Impairment Demonstrated



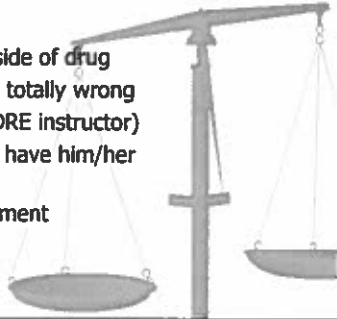
Negative Tox Results

- Work with your DRE/Officer
- Develop/understand explanations
- Examine your time-line
 - Is impairment early in the time-line
 - Type of drugs
- Issue with blood or urine??
- Consult with toxicologist
- Test for other drugs?
- Emphasize impairment
- Can lab test for it (Epice)?



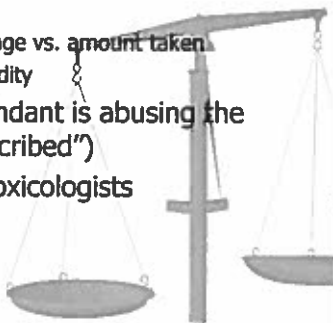
DRE Called Wrong Drug

- Figure out why
 - Polydrug use
 - Up side/down side of drug
- Partially wrong or totally wrong
- Work with DRE (DRE instructor)
- Call toxicologist – have him/her explain
- Emphasize impairment
- (A)(3)



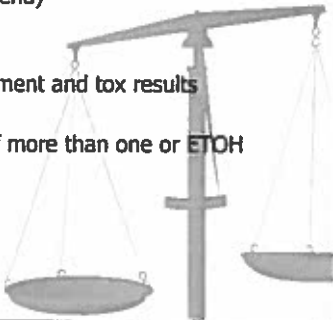
Prescriptions

- Get a copy
 - Prescribed dosage vs. amount taken
 - Investigate validity
- Evidence defendant is abusing the drug ("as prescribed")
- Consult with toxicologists



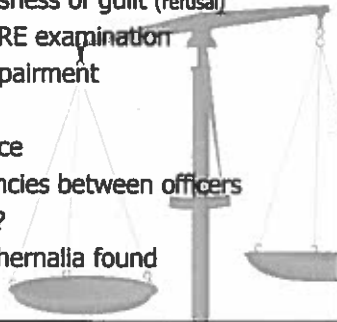
Prescriptions

- PDR (your best friend)
 - Warnings
 - Side-effects
- Emphasize impairment and tox results
 - Tie together
- Additive effects (if more than one or ETOH combo)



Refusals/Suppressions

- Argue consciousness of guilt (refusal)
- Focus on the DRE examination
- Bring out all impairment
- Admissions
- Physical evidence
- Stress inconsistencies between officers
- Call an expert??
- Drugs or paraphernalia found



Questions?